IN THE INCOME TAX APPELLATE TRIBUNAL
"C'' BENCH : BANGALORE

BEFORE SHRI N.V VASUDEVAN, VICE PRESIDNET AND
SHRI B.R BASKARAN, ACCOUNTANT MEMBER

ITA No.2325/Bang/2016
Assessment year : 2012-13

M/s Wifi Networks Pvt. Ltd., No.427, 80 Feet Circular Road, 6th Block, Koramangala, Bengaluru-560 095. PAN – AAACW 5293 L	Vs.	TheDy. Commissioner of Income-tax, Circle-7(1)(2), Bengaluru.
APPELLANT		RESPONDENT

ITA No.1198/Bang/2017
Assessment year : 2012-13

The Dy. Commissioner of Income-tax, Circle-7(1)(2), Bengaluru.	Vs.	M/s Wifi Networks Pvt. Ltd., No.427, 80 Feet Circular Road, 6th Block, Koramangala, Bengaluru-560 095. PAN – AAACW 5293 L
APPELLANT		RESPONDENT

Assessee by	:	Shri Sudheendra B.R, Advocate
Revenue by	:	Smt. R Premi, JCIT (DR)

Date of hearing	:	10.10.2019
Date of Pronouncement	:	25.10.2019

O R D E R

Per B.R Baskaran,Accountant Member

These cross appeals are directed against the order dated 19-10-2016 passed by Ld CIT(A)-7, Bengaluru and they relate to the assessment year 2012-13.

2. At the time of hearing, the ld AR submitted that the tax effect involved in the appeal filed by the Revenue is less than Rs.50.00 lakhs. Accordingly,he submitted that the Revenue is precluded from pursuing this appeal as per Circular No.17/2019 dated 8/8/2019 issued by Central Board of Direct Taxes, which has been clarified by CBDT as applicable to all pending appeals, vide its Instruction dated 20/8/2019. The Ld D.R, on the contrary, submitted that the tax effect as well as whether the issues contested in this appeal fall in any of the exception provided in the Circular are required to be checked at the end of the AO.

3. We heard the parties and perused the record. We notice that the tax effect involved in the appeal of the revenue apparently is less than Rs.50.00 lakhs. Accordingly we are of the view that the revenue is precluded for pursuing its appeal as per the CBDT circular, referred supra. However, liberty is given to the revenue to move appropriate application within the limitation period, if it is found that the tax effect involved is more than Rs.50.00 lakhs or the issues contested fall in the category of exceptions provided in the Circular. With these observations, we dismiss the appeal of the revenue.

4. Now we shall take up the appeal filed by the assessee. The first issue relates to disallowance of depreciation. The facts relating to this issue, as narrated by the AO, are that the assessee had claimed depreciation of Rs.30.99 lakhs on the WDV of "imported software". Since the assessee did not deduct tax at source on the payment made for purchase of software, the AO took the view that depreciation claimed by the assessee is not allowable as deduction u/s 40(a)(ia) of the Act. Accordingly, he disallowed the depreciation claim of Rs.30.99 lakhs.

5. Before the ld CIT(A), the assessee submitted that it had claimed depreciation of Rs.30.99 lakhs on "intellectual property rights" purchased by it in the financial years 2005-06 and 2006-07 relevant to the asst. years 2006-07 and 2007-08 respectively. The assessee further contented, by placing reliance on the decision of Delhi ITAT in the case of SMS Demag Pvt. Ltd., 132 TTJ 42, that the disallowance prescribed u/s 40(a)(ia) is not applicable to the claim of depreciation.

6. The ld CIT(A) noticed that identical disallowance was made in asst. year 2007-08 and 2008-09 by the AO and the Tribunal, vide its order passed in ITA No.189 & 190/Bang/2012 has held that no disallowance u/s 40a(ia) of the Act can be made in respect of depreciation claimed by the assessee. The ld CIT(A), on the contrary, took the view that the IP rights can be treated either as copy right or secret formula or design etc., and since the owner of IP right (i.e., MD of the assessee company) had retained the rights and

allowed the assessee only to use the rights, the same would fall under the definitionof “royalty” as defined under Explanation – 2 of sec. 9(1)(vi) of the Act. Accordingly, by following the decision rendered by Hon’ble Karnataka High Court inthe case of Samsung Electronics Co. Ltd., (2011) 203 TM 477, the ld CIT(A) took the view that the assessee is entitled to claim the payment made for IP rights as revenue expenditure. Accordingly, the Ld CIT(A) held that the assessee was not right in capitalizing the purchase value of IP rights and consequently in claiming depreciation thereon. Accordingly he directed the AO to treat the depreciation claim as the claim for deduction of royalty payment, i.e., as revenue expenditure. Since the assessee did not deduct tax thereon, the ld CIT(A) confirmed the disallowance made by the AO u/s 40(a)(ia) of the Act.

7. The ld AR submitted that both the tax authorities have not properly understood the facts relating to the present issue. He submitted that the assessee company was promoted by a person named Shri Mohan Raju. Subsequently a Bombay based company named M/s. Wide Screen Holdings Pvt. Ltd., (WHPL) acquired 51% of the shares of the assessee company. Thereafter, a tripartite agreement was entered between the assessee company, Shri Mohan Raju and WHPL. In the said agreement, a non-compete clause was incorporated, as per which, the right of first refusal was given to the assessee company and WHPL in respect of any future business initiatives that may be taken by Shri Mohan Raju in specified business areas. It was further provided that if Shri Mohan Raju undertakes any new business initiative either as promoter or as

shareholder or partner inthe filed of telecommunication, digital media and convergence other than those specified in class 2(b) of the agreement, then Shri Mohan Raju should offer 74% of his economic interest in the new venture to the assessee company. In consideration of granting above said right to the assessee company, Shri Mohan Raju was paid a sum of Rs.5 crores in aggregate i.e Rs.1.00 crore was during the financial year 2005-06 and the balance of Rs.4.00 crores was paid during the financial year 2006-07. The ld AR further submitted that the assessee had capitalized the above said amount of Rs.5.00 crores as Intellectual Property right and accordingly, the assessee has been claiming depreciation since then.

8. The ld AR further submitted that the assessee had not deducted tax from the above said payment of Rs.5.00 crores, when it was paid to Shri Mohan Raju. Hence the TDS Officer had initiated proceedings u/s 201 of the Act for non-deduction of tax at source from the above said payment. The assessee challenged the order passed by TDS Officer and when the matter reached the Tribunal, the ITAT vide its order dated 24/2/2016 passed in ITA No.1624 to 1627/Bang/2012, has held that the payment of Rs.5.00 crores made by the company to Shri Mohan Raju cannot be treated as royalty and hence the question of deducting tax at source u/s 194J of the Act does not arise. It was further held that the proceedings u/s 201 is liable to be cancelled, since the payee of above said amount has already paid the tax. Accordingly the ld AR submitted that the issue relating to the character of payment of Rs.5.00 crores has already been settled by the ITAT and hence the

decision rendered by Ld CIT(A) characterizing the payment as "royalty" is contrary to the decision rendered by the Tribunal and is liable to be cancelled.

9. On the contrary the ld DR supported the order passed by the ld CIT(A) on this issue.

10. We have heard the rival contentions and perused the record. From the submissions made by ld AR, we notice that there is contradiction between the facts narrated by the Ld A.R with regard to the payment of Rs.5.00 crores on which the impugned depreciation has been claimed by the assessee and the facts that were understood by Ld.CIT(A). Further, we notice that the Ld CIT(A) has not taken cognizance of the order passed by the ITAT in ITA No.1624 to 1627/Bang/2012 (Supra) or possibly it has not been brought to his notice by the assessee. In the above said order of the Tribunal, it has been held that the payment of Rs.5.00 crores made to Shri Mohan Raju was not royalty. We have noticed that the ld CIT(A) has held the payment as royalty and the said decision is contrary to the decision rendered by ITAT. Further, the above said amount of Rs.5.00 crores was paid during the financial year 2005-06 and 2006-07. The said payment had been capitalized in those years. We are concerned here with AY 2012-13 and during the year under consideration, the assessee has claimed only depreciation thereon. In the earlier years, the AO had only disallowed the depreciation claimed by the assessee by invoking the provisions of sec.40(a)(ia) of the Act, i.e., the AO has not disturbed the action of the assessee in capitalizing the payment of Rs.5.00 crores. Hence

the issue of capitalizing the payment has attained finality. Hence we are not able to understand as to how the ld CIT(A) can direct the AO to treat the amount of depreciation as royalty payment. The foregoing discussions would show that the ld CIT(A) has rendered his decision without properly appreciating the facts surrounding the issue. In any case, the facts presented by Ld A.R also, in our view, requires verification. Hence, we are of the view that this issue requires fresh examination at the end of the ld CIT(A). Accordingly we set aside the order passed by ld CIT(A) on this issue and restore the same to his file for examining it afresh, after affording adequate opportunity of being heard to the assessee.

11. The next issue relates to disallowance of payments made outside India by invoking provisions of sec. 40a(i) of the Act. The Ld CIT(A) had confirmed disallowance of payments made outside India to two persons. At the time of hearing the ld AR did not press the ground numbered as 3.2 relating to disallowance of Rs.5,17,951/- and in this regard, he also made necessary endorsement on the grounds of appeal. Accordingly we dismiss the said ground as not pressed.

12. The ground No.3.1 relates to disallowance of Rs.7,62,090/- for non deduction of tax at source u/s 195 of the Act.

13. The assessee has made payment of Rs.7,62,090/- to a person named *Saabwe Paul Kisitu* and it was paid for the purpose of handling of all operations including coordinating with Indian teams for maintaining, rectifying problems, testing, upgrading

/supporting customers, contentproviders etc., in Uganda. The above said payment was made outside India for services rendered outside India i.e in Uganda. The AO held the payment as fee for technical services and accordingly disallowed the same u/s 40(a)(i) of the Act, as the assessee had not deducted tax at source. Before ld CIT(A), it was submitted that the payment made by the assessee would fall under the category of 'independent personal services', as per Article 14 of Agreement for avoidance of double taxation entered between India– Uganda. It was further submitted that ITAT, Bangalore has considered an identical issue in the assessee's own case in ITA No.189 and 190/Bang/2012 relating to asst. year 2007-08 and it has held that payment made to the above said person should be regarded as 'business profit' and the same cannot be charged in India in the absence of permanent establishment. The ld CIT(A) however held that the DTA between India and Uganda has a clause for royalty and Fee for Technical services (Art 12) and accordingly took the view that the decision rendered by ITAT in asst. year 2007-08 is not applicable to this payment. Accordingly he confirmed the disallowance made by the AO.

14. The ld AR submitted that the assessee had made identical payments in asst. year 2011-12 which came for consideration of the coordinate bench in ITA No.943/Bang/2007. The coordinate bench noticed that the DTAA entered between India and Uganda also contains Article 14 relating to independent personal services. Accordingly, the Tribunal held that in the present case Art 14 is applicable and the same is not taxable. He submitted that there is

no change in facts and accordingly submitted that the decision rendered by the Tribunal in the earlier year should be followed.

15. We heard Ld D.R and perused the record. As submitted by Ld A.R, an identical issue has been considered by the co-ordinate bench in the assessee's own case in AY 2011-12 (referred supra). For the sake of convenience, we extract below relevant discussions made by the coordinate bench in asst. year 2011-12 on this issue:-

> *"5. We have considered the rival submissions. First of all, we reproduce the relevant paras 7 to 7.5 from the order of CIT(A) which are as under.*
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> > *"7. The Twenty-Fourth, Twenty-Fifth, Twenty-Sixth, Twenty Seventh,Twenty-Eighth and Twenty-Ninth grounds pertain to the payment made by the appellant to the following Non-Residents amounting to Rs. 13,92,346/-, which was claimed as a deduction but disallowed by the assessing officer. As per the admitted facts of the case, during the previous year relevant to the Asst. Year 2011-12, the Appellant made the followings payments:-*
>
> | *Nameof the Person* | *Placeof Business* | *Amount Remitted (Rs.)* |
> |---|---|---|
> | *SaabwePaulKisitu* | *Uganda* | *820851* |
> | *NicholasLugonjo* | *Uganda* | *384540* |
> | *Timothy Nsubuga* | *Uganda* | *186955* |
> | ***Total*** | | *1392346* |
>
> *As the aforesaid non-residents were residents of Uganda, it was submitted that the appellant did not deduct taxes at source before making the aforesaid payments amounting to Rs. 13,92,346/=. At paragraph 6.1 of the assessment order, the assessing officer held*

that the aforesaid payment represented payment that was in the nature of fees for technical services as defined in explanation 2 to section 9(1) (vii) of the Act and since the said payment which was in the nature of fees for technical services was remitted without deducting taxes at source, the assessing officer disallowed the deduction claimed for the expenditure incurred towards those payments by invoking the provisions of section 40(a)(i) of the Act.

7.1 During the course of the appellate proceedings, the authorized representative made the following submissions in this regard:

"As regards payments to ***M/s. Saabwe Paul Kisitu****,NicholasLugonjo and Timothy Nsubuga, they are residents of Uganda and hence the DTAA with Uganda as per Notification: No. GSR 666(E), dated 12-10-2004 issued in terms of Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Uganda will be applicable.*

As per clause 4 of the Article 12 regarding 'royalties and fees for technical services', if the beneficial owner of the royalties or fees for technical services being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise, through a permanent establishment ITA No.943/Bang/2017 Page 5 of 12 situated therein, or performs in that other State independent personal services from a fixed base situated there in, and the right or property in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of

Article 7 or Article 14, as the case may be, shall apply.

As the nature of services performed by these persons residing in Uganda, to whom the payments have been made are of personal nature, the Article 14 concerning 'independent personal services' may become applicable. And according to the Article 14, the amounts paid to the specified persons will be taxable only in the Contracting State i.e. Uganda and not in India as they do not have a fixed base regularly available to him nor his stay was for a period aggregating 183 days or more, in India. However, the Article 7 which deals with 'business profits' may be applied, since the Article 12 dealing with 'royalty and fees for technical services' is not applicable. The Appellant Company submits that it is a settled principle that business profit of a resident of a contracting state is not chargeable to tax in the other contracting state unless the non-resident carried out the business through a PE in India. In the absence of a PE in India, the business profit of the non-resident is not taxable in India. Accordingly, it is submitted that the payments made to M/s Saabwe Paul Kisitu, Nicholas Lugonjo and Timothy Nsubuga, the residents of Uganda, during the assessment year 2011-12, as retainer fees was also not chargeable to tax in India and therefore there was no liability to deduct tax at source in respect of this payment, under section 195 of the Income Tax Act, 1961. Alternatively, it is submitted that the payments of Rs.38,71,485/- towards Retainer Fees were actually made during the previous year and there was no amount payable as on 31.3.2011 and hence no disallowance under section 40(a)(i) of the Income tax Act, 1961 can be made. We rely on the decision of the ITAT Special Bench in the case of Merilyn Shipplilg&

Transports Vs Addl. CIT (2012) 16 ITR (Trib) 1, where the Special Bench by majority held, "the provisions of section 40(a)(ia) of the Act are applicable only to the amounts of expenditure which are payable as on the date 31st March of every year and It cannot be invoked to disallow which had been actually peta during the previous year, without deduction of TDS'.

7.2 The aforesaid submissions made on behalf of the appellant were carefully considered. At paragraph 6.1 of the assessment order, the assessing officer has given a factual finding to the effect that Mr.Saabwe Paul Kisitu, Mr. Nicholas Lugonjo and Mr. Timothy ITA No.943/Bang/2017 Page 6 of 12 Nsubugawere handling all the operations of the appellant, including services such, as technical coordination with the members of the Indian teams for the purpose of maintenance, rectification of problems, testing, upgrading/ supporting services to customers, content providers etc., that are in. the nature of technical services and therefore the assessing officer held that the payments amounting to Rs. 13,92,346/- made by the appellant without deduction of taxes at source to Mr. Saabwe Paul Kisitu, Mr. Nicholas Lugonjoand Mr. Timothy Nsubuga, who were the residents of Uganda were in the nature of fees for technical services as defined in explanation2 to section 9(1) (vii) of the Act and accordingly subjected the deduction claimed for that expenditure to disallowance u/s 40(a)(i)of the Act. The Convention between the Government of the Republic Of India and the Government of tile Republic Of Uganda for the Avoidance of Double Taxation and for the prevention Of Fiscal Evasion with respect to taxes on income states at Clause 3(b) of Article 12 as follows:

"The term "fees for technical services" means payment of any kind in consideration for tile rendering of any managerial, technical or consultancy services including the provision of services by technical or other personnel but does not include payments for services mentioned in Articles 14 and 15of this Convention."

The facts of the case indicate that the services rendered by Mr.Saabwe Paul Kisitu, Mr. Nicholas Lugonjo and Mr. Timothy Nsubuga, residents of Uganda were in the nature of technical and consultancy services. Clauses 1 and 2 of Article 12 of. The Convention between the Government of the Republic of India and the Government of the Republic of Uganda for the Avoidance of Double Taxation and for the prevention Of Fiscal Evasion with respect to taxes on income state as follows:

"1. Royalties or fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State maybe taxed in that other State.

2. However, such royalties or fees for technical services may also be taxed in the Contracting State in which they arise, and according to the laws of that State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or fees for technical services.

" 7.3 When a resident of Uganda earns income from a source in India, the possibility of double taxation arises because India taxes that income on the source principle whereas Uganda may tax it on the residence principle. Generally, following the source based taxation, the Source

Country is allocated the right to tax the income arising therein. While the Residence Country also taxes the ITA No.943/Bang/2017 Page 7 of 12 income following the residence based taxation, the Residence Country mitigates the effect of double taxation either by way of tax exemption or by way of tax credit. The profits of an enterprise of one Contracting State are taxable in the other state, only if the enterprise maintains a Permanent Establishment (PE) in the later state and only to the extent such profits are attributable to the PE.

The profits attributable to a PE are either exempted in State of Residence or the State of Residence allows credit of taxes paid by the PE on such profits. To this extent, the taxing jurisdiction by the State of Residence is said to be transferred to the State of Source, where the person needs to file his return of income and comply with the domestic tax laws.

7.4 In a landmark decision in the case of (IT Vs. Vishakhapatnam Port Trust cited in (1983) 144 ITR 146 (AP), on the subject of "Permanent Establishment", the Honourable Andhra Pradesh High Court observed as follows:

"The words "Permanent Establishment" postulate the existence of a substantial element of an enduring or permanent nature of a foreign enterprise in another, which can be attributed to a fixed place of business in that country. It should be of such a nature that It would amount to a virtual projection of the foreign enterprise of one country onto the soil of another country.

"7.5 In the case of the appellant, though Mr. Saabwe Paul Kisitu, Mr.NicholasLugonjo and Mr. Timothy Nsubuga were the residents of Uganda, their source of income for the technical

services rendered by them, was located in India. Therefore, as per Clauses 1 and 2of Article 12 of the Convention between the Government of the Republic of India and the Government of the Republic of Uganda for the Avoidance of Double Taxation and for the prevention of Fiscal Evasion with respect to taxes on income, the payments amounting to Rs. 13,92,346/= made by the appellant in the name of 'Retainer Fees' to the residents of Uganda viz. Mr. SaabwePaulKisitu, Mr. Nicholas Lugonjo and Mr. Timothy Nsubuga for rendering technical services to the appellant company located in India ought to have been subjected to deduction taxes at source because, the permanent establishment (PE) was located in India."

6. From the above paras reproduced from the order of CIT(A), it is seen that he has discussed only Article 12 and section 9(1)(vii) of IT Act and there is no discussion regarding Article 14. Hence for the sake of ready reference, we reproduce Article 12 and 14 of the DTAA between Uganda and India from pages 81 and 82 of the paper book.

"ARTICLE 12

ROYALTIES AND FEES FOR TECHNICAL SERVICES
1. Royalties or fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties or fees for technical services may also be taxed in the Contracting State in which they arise, and according to the laws of that State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or fees for technical services.

3. (a) The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, and films or tapes for television or radio broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or any industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience. (b) The term "fees for technical services" means payment of any kind in consideration for the rendering of any managerial, technical or consultancy services including the provision of services by technical or other personnel but does not include payments for services mentioned in Articles 14 and 15 of this Convention.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for technical services being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

5. Royalties or fees for technical services shall be deemed to arise in a Contracting State when the payer is that State itself, a political subdivision, a local authority or a resident of that State. Where, however, the person paying such royalties or fees for technical services, whether he is resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the

royalties or fees for technical services was incurred, and such royalties or fees for technical services are borne by such permanent establishment or fixed base, then such royalties or fees for technical services shall be deemed to arise in the State in which the permanent establishment or fixed base is situated. ITA No.943/Bang/2017 Page 9 of 12 6.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties or fees for technical services, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

ARTICLE 14
INDEPENDENT PERSONAL SERVICES

1. *Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State except in the following circumstances, when such income may also be taxed in the other Contracting State :*
   (a) if he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other State; or
   (b) if his stay in the other State is for a period or periods aggregating 183 days or more in any 12-month period commencing or ending in the fiscal year concerned; in that case only so much of the

income as is derived from his activities performed in that other State may be taxed in that other State.

2. The term "professional services" includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, surgeons, dentists and accountants."

7. From the above two articles, it is seen that Article 12 specifies that Article 12(3)(b) does not include payments for services mentioned in Article 14 and 15 of this convention. It is also seen that Article 14 is in respect of individual personnel services and it includes professional services or other activities of independent character of the assessee. The ld. DR of revenue has drawn our attention to copy of agreement of the assessee with Mr. Saabwe Paul Kisitu available on pages 129 to 133 of paper book and it was submitted that as per this agreement, this person was to render services for handling ITA No.943/Bang/2017 Page 10 of 12 all operations including Co-coordinating with Indian Teams for maintaining, rectifying problems testing, upgrading / supporting customers, content providers etc. at Uganda. It was the submission of the ld. DR of revenue that the nature of services specified in the agreement is clearly technical services and therefore, Article 12 is applicable and not Article 14. In our considered opinion, there is no merit in this argument of ld. DR of revenue because Article 14 is applicable for individuals and it includes professional services also. As per the services to be rendered by these three persons as per the agreement on record, it cannot be said that the services being rendered by these persons is not professional services. Professional services may be of technical nature also and only because the professional services are of technical nature, it cannot be said that Article 14 is not applicable. As

per the Tribunal order cited by ld. AR of assessee having been rendered in the case of Poddar Pigments Ltd. Vs. ACIT (supra) also, similar issue was decided in favour of the assessee. Para 14 of this Tribunal order is relevant and hence, the same is reproduced herein below for ready reference.

> *"14. According to Article 12 of the DTAA, if the 'Fees for Technical services' is arising in India but paid to resident of Germany than such Income may be taxed in Germany. However, if he is beneficial owner of FTS , then such Income may also be taxed in India and according to the laws of India but not more than 10 % of the Gross amount. In the present case, the characterization of Income of Dr. Thiele is correctly made as „Fees for Technical services" and he is the beneficial owner of such consideration. Therefore, if the Income falls under Article 12, then it is chargeable to tax @ 10 % in India. Further, if the income as per article 14 is arising out of the fix base in India and if the services provider stays for 120 days or more in India, then such income shall be chargeable as per attribution rules pertaining to the activities or base in India. As Dr. Theile does not have any Fixed Base and does not satisfy the condition of the minimum stay in India, his income cannot be taxed in India but in Germany only as per Article 14 of the DTAA. From the above general analysis, it is clear on plain reading that the income is chargeable to tax under Article 14 as well as article 12 of The DTAA. It is also an established rule of the Interpretation of Treaties that specific or special provision in treaty shall prevail over and take precedence over the general ones. In the present case, the provision of article 14 of the DTAA is more specific as it applies specifically to „professional services" provided by the 'Individual resident', however, Article ITA*

No.943/Bang/2017 Page 11 of 12 12 provides for residents of foreign countries, therefore, Article 12 is broader in scope and general in nature compared to Article 14 of DTAA. Further the meaning of the Term " fees For technical services" in Article 12 (4) of The DTAA excludes only income covered under Article 15 i.e. "Dependent personal Services" and not income Covered under Article 14 of The DTAA. Therefore, if there can be many instances of such incomes derived by the individuals which can be characterized as " Fee For Technical services" may also be covered under Article 12 as well as Article 14 of The DTAA. Only distinguishing feature is that Article 12 is an omnibus provisions for such income where as article 14 is a specific provisions related to individuals. Further Article 14 is para material similar to Article 7 of the DTAA, the only difference being that Article 7 applies to all the enterprises of the states whereas the Article 14 applies to individual only who earn such income from sources state. Therefore, we hold that article 14 is a more Specific article applicable to the impugned income of the nonresident, same shall be applied and not the General Provision of Article 12 of The DTAA. In taking such a view we find support from the Decision of Honorable High courts in CIT v. Copes Vulcan Inc. [1987] 167 ITR 884 ; [1987] 30 Taxmann 549, [2004] 267 ITR 209 (Kar) in AEG AKTIENGESLLSCHAFT v. COMMISSIONER OF INCOME-TAX. Furthermore, we also draw support from the Advance Ruling in Case of Dieter Eberhand Gustav Van Der Mark V CIT 235 ITR 698 (AAR) where it ruled that, if the applicant's case falls under a more beneficial provision, it would be futile to stretch the interpretation to bring it under some other provision of the treaty or the Income-tax Act. This position is too well established to require

any further elaboration. In this Case AAR was rendering advance ruling in identical case where the issue of interpretation of Treaty between India and Germany was involved where in article 12 does not specifically exclude income covered article 14 of the DTAA. Further ld AR has relied up on the Decision of The coordinate benches in case of 86 ITD 384 in case of Graphite India and another decision in case of 73 Taxmann.com 108 where the issue involved was Indo US Tax Treaty, where the Article 12(5)(e) specifically excluded income covered under Independent personal Services , therefore, they do not apply to the facts before us as there is no such specific exclusion in Article 12 of Indo German Tax Treaty."

8. From the above para reproduced from this Tribunal order, it is seen that it was held that Article 14 of DTAA is more specific as it applies specifically to professional services provided by the individual resident whereas Article 12 provides for residents of foreign countries and therefore Article 12 is broader in scope and general in nature compared to Article 14 of DTAA. In view of above discussion, we hold that in the facts of present case, the services ITA No.943/Bang/2017 Page 12 of 12 received by the assessee from these three persons is covered by Article 14 and therefore, same cannot be included in Article 12 because as per Article 12(3)(b), it is specifically provided that the term 'fees for technical services does not include payments for services mentioned in Articles 14 and 15 of this convention. We hold that in the present case, Article 14 is applicable and therefore, the receipt of these three persons cannot be considered under Article 12(3)(b) and as a consequence, the same is taxable in the country of resident i.e. Uganda and therefore, no TDS was deductible u/s 195 and

consequently, disallowance u/s. 40(a)(i) is not justified and therefore, we delete the same. 9. In the result, the appeal filed by the same."

15. Since the facts relating to this issue is identical in nature,following the order passed by the coordinate bench in asst. year 2011-12, we hold that disallowance made u/s 40(a)(i) is not justified and accordingly direct the AO to delete the same.

16. The next issue relevant to disallowance of write off of miscellaneous expenses amounting to Rs.3,67,188/-. The facts relating to this issue are that the assessee claimed a sum of Rs.3.67 lakhs as deduction, being the rental/telephone deposits written off. According to the assessee, it could not recover those deposits, after vacating the premises. The AO took the view that claim of assessee is capital in nature, as the deposits were categorized as payment on capital account. Accordingly, the AO disallowed the claim. The ld CIT(A) also took the view that the payment made by the assessee as advance or deposits are towards capital account and hence the writing off of the same is not allowable as deduction.

17. The ld AR submitted that the amount of Rs.3,67,188/- consisted of telephone deposit of Rs.3,401/-, rent deposits of Rs.1,63,000/-, advance rent of Rs.1,88,942/- and the balance amount represented advance payment made for availing various services. He submitted that these payments have been made in the normal course of business and since they could not be recovered, the assessee has written off the same. He submitted that the tax authorities are not justified in holding the above said payments as

capital in nature. In this regard he placed reliance on the decision rendered by Hon'ble Karnataka High Court in the case of Pr. CIT Vs. IDS Software Solutions India Pvt. Ltd., (ITA No.496/2017) dated 11/10/2018. He submitted that the assessee in the above said case had paid an advance of Rs.20.00 lakhs to the land lord for occupying additional space, which was necessary for expansion of its business. Since the contract got terminated, the landlord forfeited the above said advance of Rs.20 lakhs and the same was claimed as deduction. The Tribunal took the view that the amount was paid as advance for taking additional space on lease and the loss was suffered in the course of business and accordingly held that the claim is allowable. When the matter reached the Hon'ble High Court, the Hon'ble Karnataka High Court took the view that the Tribunal as well as Commissioner has given a finding of fact and accordingly declined to interfere with the decision rendered by the Tribunal.

18. We heard ld DR and perused the record. The details of amount of Rs.3,67,188/- has been tabulated by the ld CIT(A) as under in para 8 of its order.

Sl.No.	Particulars		Amount(Rs.)
1	BSNL Hyderabad	Telephone Deposit	3401
2	Digi Key Corporation	Advance for services	1623
3	Yatendar Mohan Sadh	Advance for services	7222
4	Nirmala Escon, Hyd	Advance Rent	188942
5	Neeraj Mehra	Advance for services	3000
	Rent Deposits		
6	M R Srinivas, Hyderabad	60000	
7	Ashis Patel, Ahmedabad	7000	
8	Himanshu Kumar	21000	
9	Chennai	20000	
10	Rajashekar Hiremath	55000	
			163000
	Total		367188

19. Though the assessee claims that these payments were made in the normal course of business, we noticed that the rent deposits have been made to 5 persons and advance rent has been paid to one person. The payments made to 3 persons have been described as “advance for services”. Though there is no dispute with regard to the principle that the payment made in the normal course of conducting business, if not recoverable is allowed as deduction, yet we noticed that the AO did not examine the nature of payment and the fact whether these payments were made in the course of conduction of business. We have noticed earlier that the AO has disallowed the claim by holding that all the payments have been made on capital account. Accordingly we are of the view that this issue requires fresh examination at the end of the AO. Accordingly we set aside the order passed by the ld CIT(A) on this issue and

restore the same to the file of the AO with the direction to examine the nature of payment and decide the same afresh inthe light of the discussions made supra.

20. In the result, appeal field by the assessee is treated as allowed for statistical purposes and the appeal filed by the Revenue is dismissed.

Order pronounced in the Open Court on **25th October, 2019.**

Sd/-	**Sd/-**
(N.V Vasudevan)	**(B.R Baskaran)**
Vice President	**Accountant Member**

Bangalore,
Dated, 25th October, 2019.
/ vms /

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.

1. Date of Dictation ……
2. Date on which the typed draft is placed before the dictating Member …….
3. Date on which the approved draft comes to Sr.P.S …….
4. Date on which the fair order is placed before the dictating Member ……..
5. Date on which the fair order comes back to the Sr. P.S. ……..
6. Date of uploading the order on website……..
7. If not uploaded, furnish the reason for doing so ……..
8. Date on which the file goes to the Bench Clerk ……..
9. Date on which order goes for Xerox & endorsement……
10. Date on which the file goes to the Head Clerk …….
11. The date on which the file goes to the Assistant Registrar for signature on the order …….
12. The date on which the file goes to dispatch section for dispatch of the Tribunal Order …….
13. Date of Despatch of Order. ……..